

BUREAU OF AUTOMOTIVE REPAIR
INITIAL STATEMENT OF REASONS

HEARING DATES:

CENTRAL CALIFORNIA

Monday, November 28, 2011 at 11:00am
BAR Field Office
4152 West Swift Ave., Suite 104
Fresno, CA 93722

SOUTHERN CALIFORNIA

Tuesday, November 29, 2011 at 11:00am
BAR Field Office
16735 Von Karman Ave., Suite 100
Irvine, CA 92606

NORTHERN CALIFORNIA

Wednesday, November 30, 2011 at 11:00am
Contractors State Licensing Board
9821 Business Park Drive
Sacramento, CA 95827

**SUBJECT MATTER OF
PROPOSED REGULATIONS:**

Repair Assistance Consumer Co-Payment
Modification

SECTIONS AFFECTED:

§§ 3394.3, 3394.4, 3394.6 and 3394.7 of Article 11,
Chapter 1, Division 33, Title 16, California Code of
Regulations.

SPECIFIC PURPOSE OF REGULATORY PROPOSAL:

The Bureau of Automotive Repair (BAR or Bureau) is proposing the following amendments to existing regulations:

- I. Modify the Repair Assistance (RA) consumer co-payment. This update will remove the current \$20 co-payment and instead will require the consumer co-payment to be the total cost of testing and diagnosing the Smog Check failure. (§ 3394.4)
- II. Remove the optional crediting of emissions-related repairs toward the consumer co-payment. (§ 3394.6)

- III. Amend the Consumer Assistance Program (CAP) application to reflect the consumer co-payment modification and updates to the Federal Poverty Level as mandated by statute. (§§ 3394.6 and 3394.7)
- IV. Modify eligibility requirements to require consumers to self-certify their income and to provide verification of income upon request of the Bureau. (§ 3394.6)

The proposed action will make the following changes to existing regulation:

- 1. Amend Section 3394.3 of Article 11, Chapter 1, Division 33, Title 16, California Code of Regulations, as follows:
 - a. Remove from subparagraph (b) “diagnostic and” and “Once the station has initiated any diagnostic or repair work on the vehicle, the owner’s eligibility status or associated co-payment as specified in section 3394.4 shall not change.”
- 2. Amend Section 3394.4 of Article 11, Chapter 1, Division 33, Title 16, California Code of Regulations, as follows:
 - a. Remove from subparagraph (B) of subsection (a) (3) “Spend a minimum co-payment of twenty dollars (\$20) on emissions-related repairs at a licensed smog check test-and-repair station” and remove “Money spent to correct tampered emissions control systems or to make a vehicle testable shall not be included in the co-payment.” Add “The consumer shall pay the total cost of testing and diagnosing the emissions-related failure as a co-payment for receiving Repair Assistance.”

This edit modifies the co-payment requirement. Currently, a consumer is responsible for making a \$20 co-payment before receiving the \$500 CAP repair benefit. Under this modification, the consumer will be responsible for all testing and diagnosis fees in lieu of the \$20 co-payment. This modification will address the large proportion of the \$500 CAP benefit consumed on testing and diagnosing a vehicle by Gold Shield stations based on existing CAP policy. This change will also help to encourage consumers to comparison shop and possibly negotiate a better price from the station for the testing and diagnosis of their vehicle. It will also help to encourage stations to compete on price for business from CAP consumers. The budget savings resulting from this change would help BAR meet projected demand for CAP, which will exceed estimated revenues.

- 3. Amend Section 3394.6 of Article 11, Chapter 1, Division 33, Title 16, California Code of Regulations, as follows:

- a. In subsection (a), replace the current CAP application form (11/10) with form (08/11).
- b. In subsection (b) remove “The application must,” “include,” and “copies.” Add “To qualify based on income level, the applicant must certify under penalty of perjury that he or she has a household income that is less than or equal to two hundred twenty-five percent (225%) of the federal poverty level, as published quarterly in the Federal Register by the United States Department of Health and Human Services.” Add “The bureau may require the applicant to,” “provide a copy,” and “one of.”
- c. In subsection (b) (1) remove “Under the Repair Assistance option, copies of any invoices for emissions-related repairs performed prior to applying to the Consumer Assistance Program, for the sole purpose of crediting the consumer co-payment required under section 3394.4.”

This modification deletes a reference that permits a CAP consumer to request BAR to credit toward the \$20 co-payment any emissions-related work performed on the vehicle prior to its acceptance into CAP. Since the consumer is no longer subject to a \$20 co-payment in order to receive the \$500 CAP benefit and will now be responsible for paying all testing and diagnostics fees, there is no longer a need for this section.

- d. In subsection (b) (2) remove “If applying based on income level, an applicant must provide any one of the following documents:” This change renumbers (b) (2) (A) to (b) (1).
 - e. Make other minor grammatical, editorial, and numerical changes.
 - f. Add subsection (c) which states, “A consumer who submits false information or fails to provide verification of income, as requested by the bureau, cannot receive future assistance under the Consumer Assistance Program.”
4. Amend Section 3394.7 of Article 11, Chapter 1, Division 33, Title 16, California Code of Regulations, as follows:
 - a. Remove “08_022 CAP/APP (11/10), which is hereby incorporated by reference” and add “as prescribed in section 3394.6.”

Incorporation by Reference

The incorporation by reference in sections 3394.6 and 3394.7 of the CAP application form (08_022 CAP/APP (08/11)) is appropriate since publishing this document in the California Code of Regulations would be cumbersome, unduly expensive, impractical and unnecessary. This revision reflects the correct version of the application that includes the modified consumer co-payment. The revised application will be incorporated by

reference, replacing the version dated 11/10. If anyone should wish to examine the revised application, it is always available upon request from BAR. The revised application will also be available for review throughout this rulemaking process and will be available on BAR's Web site at www.smogcheck.ca.gov.

FACTUAL BASIS

The Bureau, within the Department of Consumer Affairs, is the state agency charged with administration and implementation of the Smog Check Program (Program). The Program is designed to reduce emissions from mobile sources by identifying for repair or retirement vehicles that exceed specific emissions standards. A consumer who chooses to keep a vehicle that has failed its inspection must have it repaired in order to complete the vehicle registration renewal process.

In order to help consumers comply with the provisions of the Program, the Bureau is charged with administering CAP. Through CAP, a consumer can retire a qualified vehicle at any time and for any reason for either \$1,000 or \$1,500, if they meet income eligibility requirements. If a consumer who meets CAP's income requirements chooses to repair a vehicle after it fails a biennial Smog Check inspection, they can receive up to \$500 toward emissions-related repairs.

Consumer Co-Payment

Health and Safety Code section 44062.1(e) requires BAR to establish a co-payment for consumers participating in the RA option of CAP. Since 2000, co-payment for low-income consumers has been set at \$20. Consumers may request BAR credit toward the \$20 co-payment any emissions-related repair work performed prior to the vehicle's acceptance into CAP.

Existing law requires BAR to have two protocols for testing vehicles in the state depending on a particular region's ability to meet air quality standards. In areas of the state with better air quality, vehicles are subject to a Two Speed Idle (TSI) test. In non-attainment areas of the state, vehicles are subject to a more rigorous Acceleration Simulation Mode (ASM) test. When a vehicle fails a biennial Smog Check inspection, CAP policy allows Gold Shield stations to charge BAR a maximum of 1.8 labor hours for a TSI and 2.3 labor hours for an ASM test and diagnosis of emissions-related failures for CAP-approved vehicles.

BAR has determined that the policy of allowing stations to be reimbursed for testing and diagnosis of CAP vehicles through fixed labor hours does not currently reflect industry practice. According to BAR data, 87.5 percent and 96.2 percent of invoices paid by BAR for ASM and TSI tests and diagnoses, respectively, are at the maximum labor hours¹. Stations charge the maximum rate because BAR policy allows it. Also, there is no

¹ For the purpose of determining the number of stations charging the maximum hours BAR included stations charging BAR for 2.25 – 2.3 hours for testing and diagnosis of the emissions-related failure.

mechanism in place that would allow BAR to verify the actual hours required to test and diagnose a vehicle.

Stations acknowledge that some vehicle failures take less time to diagnose than the maximum hours permitted while others can take longer. Station owners have stated that by charging the maximum amount authorized by BAR regardless of the complexity of the diagnosis, they equalize their labor costs over all CAP vehicles. Ultimately, this means that a consumer who has a less complex failure that does not require the station to use the maximum amount of BAR-authorized testing and diagnostic hours is subsidizing the cost of a vehicle that meets or exceeds the maximum authorized hours.

The consequence of this practice is most evident on vehicles with On-Board Diagnostics (OBD II). All 1996 and newer model year vehicles are equipped with a computer-based system designed to continuously monitor emissions components. Technicians use special tools to electronically diagnose emissions-related failures. This technology allows technicians to pinpoint emissions problems quickly and more accurately than traditional diagnostic methods. Even though this technology allows a technician to perform a diagnosis in a matter of minutes, up to 96.2 percent of Gold Shield invoices for OBD II equipped vehicles are at the maximum labor hours authorized by BAR.

The ramification of the current policy is evident. BAR conducted a survey of Gold Shield stations in July 2010 to determine the cost of what a station might charge a consumer for testing and diagnostic services. The survey found that Gold Shield stations charge non-CAP consumers an average of \$92 for testing and diagnostic services. CAP data indicates that Gold Shield stations charge BAR an average of \$159 for TSI and \$203 for ASM testing and diagnosis for CAP-approved vehicles. Despite this additional cost, a study by BAR concluded that the emissions-related repairs performed by Gold Shield stations results in only slightly greater emissions reductions than those performed by regular Test-and-Repair stations for comparable CAP and non-CAP vehicles.

The impact of this policy on consumers is significant. BAR data indicates that the average cost to the state to repair a CAP vehicle is \$413. Since BAR is billed an average of \$159 for a TSI and \$203 for an ASM test and diagnosis, this means that 38.5 percent and 49.2 percent of the \$413 state benefit paid to Gold Shield stations is consumed on testing and diagnostic fees. The remaining balance of the state benefit goes towards parts, labor, and taxes. This means that a comparatively small amount of the state's CAP benefit went toward actual repairs of a vehicle in order to reduce its emissions.

When a large portion of the state's contribution is consumed by testing and diagnostic fees, less is available to actually repair the vehicle. In FY 2009-10, 14,395 (43%) of the 33,520 income-eligible consumers participating in RA had repairs exceeding the maximum state incentive of \$500, with repair bills averaging \$704.82. This means that the typical consumer contributes an additional \$204.82 in out-of-pocket for repairs. If Gold Shield stations had charged BAR a lower testing and diagnostic fee, the out-of-pocket expense for these consumers would have been substantially less.

Reimbursing stations for the high cost of testing and diagnostic services directly impacts BAR's ability to maximize its budget. Income-eligible participation in RA has increased on average 27.9 percent annually from FY 2006-07 through FY 2009-10. Demand for RA will exceed the annual appropriation in future years. Since revenue growth into the fund that supports CAP is stagnant, BAR cannot augment its budget to support increased demand for RA.

Without a change in the consumer co-payment, BAR would need to suspend RA for a portion of the year. Suspending RA would create confusion among consumers, adversely impacts consumers attempting to register their vehicle, and harms emissions reduction efforts. This option would also create inequities in participation. Specifically, consumers with registration due late in the fiscal year would not have the opportunity to participate if the program is suspended due to lack of funding. Conversely, consumers who have a vehicle registration due at or near the beginning of the state fiscal year would almost always inevitably be able to participate in CAP.

Modifying the current consumer co-payment from \$20 to the cost of testing and diagnosing the emissions-related failure would generate savings for the state, which would be directed to help meet the projected demand for CAP. This will help mitigate program suspension, which is disruptive to stations, consumers, and BAR. In addition, this change would allow BAR to better utilize the CAP budget as resources would be spent on actual repairs, while consumers could individually negotiate a better price for diagnosing and testing their vehicle.

In order to reflect the modified co-payment, minor changes have been incorporated into the CAP application.

Crediting of Emissions-Related Repairs

Currently, consumers may request a credit toward the \$20 co-payment for any expenses incurred for emissions-related repairs performed by a station prior to qualifying for CAP. BAR proposes to discontinue the optional crediting of emissions-related repairs since the consumer will be responsible for bearing the full cost of the testing and diagnosis, which will now constitute the statutorily mandated co-payment. This proposed change effectively eliminates the need for this option.

In order to reflect the deletion of the crediting of emissions-related repairs, minor changes have been incorporated into the CAP application.

Income-Eligible Consumers

This proposed regulation allows consumers to self-certify their income in order to qualify for CAP. To ensure appropriate controls, BAR will periodically and randomly require a consumer to provide income verification documents prior to receiving approval to participate in CAP. If BAR determines that a consumer has submitted false information, they will not be allowed to participate in CAP in the future.

In order to reflect this change, minor changes have been made to the CAP application.

Income Eligibility Table

The income eligibility table included on the CAP application will be revised to reflect the maximum gross household income amounts based on the recently revised 2011 Federal Poverty Level published by the U.S. Department of Health and Human Services (DHHS) (*Federal Register* Vol. 76, No.13, Thursday, January 20, 2011, pp. 3637 - 3638).

Pursuant to section 3394.4(a)(3)(A), income eligibility for CAP is based on the most current Federal Poverty Level. The income eligibility table is included in the CAP application to assist applicants in determining their eligibility. As mandated by statute, BAR is required to update its regulations, specifically the CAP application income-eligibility table, to correspond with the most current Federal Poverty Level.

UNDERLYING DATA:

Technical, theoretical or empirical studies or reports relied upon:

- Online Gold Shield station survey to assess industry billing diagnosis and testing practices of non-CAP consumers.
- Department of Consumer Affairs, Bureau of Automotive Repair. Consumer Assistance Program application, 08_022 CAP/APP (08/11).
- Department of Consumer Affairs, Bureau of Automotive Repair. Consumer Assistance Program application, 08_022 CAP/APP (11/10).

Business Impact:

Since the consumer, rather than BAR, will pay for the testing and diagnosis of emissions-related failures, Gold Shield stations may lose approximately \$3,048,101 in testing and diagnosis revenue annually. This estimate assumes Gold Shield CAP testing volumes of 28,535 (25,824 ASM tests and 2,711 TSI tests), an average BAR reimbursement of \$203 for ASM tests and \$159 for TSI tests, and the \$92 mean testing and diagnosis fee charged by stations to non-CAP consumers. This calculates as follows: $((\$203 \text{ average CAP ASM test fee} - \$92 \text{ non-CAP vehicle testing fee} = \$111 \times 25,824 \text{ ASM vehicles} = \$2,866,464) + (\$159 \text{ average CAP TSI test fee} - \$92 \text{ non-CAP vehicle testing fee} = \$67 \times 2,711 \text{ TSI vehicles} = \$181,637) = \$3,048,101).$

Specific Technologies or Equipment:

This regulation does not mandate the use of specific technologies or equipment.

Consideration of Alternatives:

No reasonable alternative to the regulation would be either more effective in carrying out

the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed regulation.

Set forth below are the alternatives that were considered and the reasons each alternative was rejected:

1. BAR considered taking no action. However, data suggests that Gold Shield stations charge BAR more to test and diagnose a CAP-approved vehicle than a comparable non-CAP vehicle. Although they charge BAR more, data also suggest that these repairs are only slightly more effective in reducing emissions than for a comparable non-CAP vehicle.

This alternative also does not address the imbalance between consumer demand and available resources. Consumer demand for CAP services has increased on average 27.9 percent annually since FY 2006-07. Based on current trends, BAR would need to suspend RA for a portion of each year, creating confusion among consumers about the program, and adversely impacting consumer's ability to have emissions-related repairs performed on their vehicles. Simultaneously, those consumers would see a large portion of their CAP benefit spent on non-emissions-related repairs – defeating the primary purpose of CAP.

2. BAR considered reducing its maximum repair contribution from \$500 to \$400. This option is not effective because it does not address the underlying issue concerning CAP expenditures – the State's current policy concerning labor hours consumes a large portion of the \$500 CAP benefit, leaving comparatively little for the repair of the vehicle.